***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

75-1287

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To be Argued by
ANTHONY F. CORRERI

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

MANUEL RODRIGUEZ,

Appellant.

On Appeal from the U.S. District Court for the
Eastern District of New York

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BRIEF FOR APPELLANT

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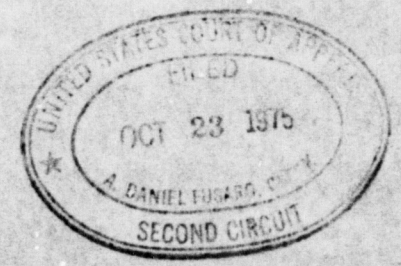


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## STATEMENT OF FACTS

By indictment dated February 13, 1975, the appellant, Manuel Rodriguez was charged in indictment #75-CR 112 with twelve counts of harboring aliens, in violation of Title 8, U.S. Code, Sec. 1324 (a)(3). The substance of each of the twelve counts was that the appellant harbored each of twelve different individuals in two designated "dwellings" owned by appellant knowing that these individuals were aliens, not duly admitted into the United States by an immigration officer nor lawfully entitled to reside within the United States.

Prior to trial, a motion was made by appellant for omnibus relief as follows:

I- Quashing and dismissing each and every count of the indictment upon the grounds

(a) that each count of the indictment was not

supported by legal and sufficient evidence before the grand jury;

(b) that such evidence that was produced before the grand jury was tainted and obtained in violation of the Fourth Amendment constitutional rights of the appellant as the owner of the premises mentioned in the indictment, in that no search warrant or warrant of arrest for the appellant was obtained;

(c) that each count fails to charge an offense under the statute involved in that the indictment fails to disclose the acts and conduct of appellant necessary to constitute the "harboring" proscribed by the statute involved;

(d) that the statute involved is unconstitutionally vague and indefinite and purports to make criminal the innocent act of furnishing lodging to aliens on the basis of alleged constructive knowledge of their illegal alien status.

II- Suppressing for use upon the trial of the indictment by the U.S.Attorney in any manner, shape or form:

(a) the production and the testimony of the aliens mentioned in the indictment as witnesses, any leads furnished by said aliens, any statements, oral or written furnished by said aliens, any documents, papers, passports, visas or other property seized from said aliens.

(b) any testimony from the I.N.S. agents or any other governmental employees as to what was observed or heard at the premises mentioned in the indictment at the time mentioned therein.

III- Other relief not pertinent to the appeal herein.

The motion was granted to the extent of granting a pre-trial hearing with reference to the alleged illegal search and seizure. At the pre-trial suppression hearing, the following facts were elicited from the I.N.S. agents involved in the investigation.

On the afternoon of February 11, 1975, Neil Jacobs, a Criminal Investigator with the Immigration & Naturalization Service (hereinafter referred to as I.N.S.) conferred with his supervisor, James J. Roland at the I.N.S. Headquarters at 20 West Broadway, Manhattan, New York. Jacobs advised his supervisor of the ongoing investigation with reference to the aliens. Jacobs did not recall if he mentioned the name of appellant, Manuel Rodriguez as the owner of the dwellings involved in the investigation. Roland told Jacobs that he could use whatever agents he required. Jacobs selected seven agents besides himself who were to use four cars the following morning.

On February 12, 1975 at about 7 A.M. all agents met pursuant to pre-arrangement at a diner in Nassau County. After meeting at the diner, four of the agents used two cars, two agents in each car, and went to one of the premises, namely, 18 Bunting Lane, Hicksville. The other four agents used two other cars and contacted premises 113 Brittle Lane, Levittown, New York, both dwellings owned by appellant. All I.N.S. agents spoke Spanish.

Jacobs testified he arrived at 18 Bunting Lane between 7 and 7:30 A.M. together with two cars and three other agents. Immediately upon arrival Jacobs noted a Toyota car and the operator thereof was "attempting to start the car". Jacobs prevented any further attempt to start the car by confronting the operator. Jacobs immediately approached the operator while he was sitting in the car. The individual was later identified as Jorge Alberto Galeac-Alvarenga (hereinafter referred to as Jorge Galeac). Appellant was charged with harboring this alien in Count 9 and the jury dismissed Count 9 of the indictment. Jorge Galeac was not seen exiting from the premises by Jacobs. Jacobs testified he identified himself as an I.N.S. agent and upon interrogation, Jorge Galeac furnished his name, that he entered this country through El Salvador and had not been duly admitted into the United States by an immigration officer. Jacobs directed him to exit from the car. He was then placed under arrest. At Jacobs' direction Galeac entered the premises with Jacobs. Jacobs followed him into the premises by entering through the front door. opened by the alien at Jacobs' direction. Immediately after entering into the premises by Jacobs and Galeac, the three other I.N.S. agents also entered. Jacobs further testified that upon entering the premises, he observed another person believed to be an alien of Hispanic origin and after questioning such person, ascertained the identity of the alien as Alba Rivas (Count 6 of the indictment) who was deemed to be illegally in the country. All four I.N.S. agents were then in the dwelling and a systematic

search was then made of each and every room. Most of the aliens were apprehended in the bedrooms and entry into the bedrooms was had by opening the door into the said bedrooms, some of the aliens being still asleep. Each of the persons were questioned in turn and upon ascertaining that they were in the country illegally, were arrested.

The same procedure was followed at 113 Brittle Lane. Four agents in two cars placed the premises under observation. When a person exited, he was detained and questioned regarding his right to remain in the United States. The individual identified himself as Puerto Rican and no question arose as to his legal status. His wife who accompanied him was also questioned and her legal status was not questioned. Appellant was not charged with harboring either the wife or the husband involved. Nevertheless, the four agents made a warrantless entry into the dwelling. After entering,a room by room search was conducted including the bedrooms and such search disclosed some persons who were legally in the country and some who were illegally in the country. Those persons illegally in the country were apprehended and appellant charged with harboring such individuals (Counts 10,11 & 12). Appellant was found not guilty of harboring any of the foregoing individuals so that the question remains moot as to whether an illegal search and seizure was had as to this dwelling. The factual pattern is recited so that the court may be aware of the state of mind of the I.N.S. agents in the so-called investigation sought to be conducted. At premises 113 Brittle Lane, one of the aliens was the brother of appellant. His bedroom was entered while he was asleep in bed. He was directed to dress, the usual

questions were asked of him as to his status as an alien, where and when he entered the United States. Obviously, appellant's brother was legally in the United States as was the individual who was interrogated outside the premises.

The entire purpose of the operation by the I.N.S. agents was twofold:

(a) to apprehend any illegal aliens found outside or inside the premises, and

(b) to charge the appellant with harboring such aliens.

Preliminary investigation had been done with reference to the alleged crime of harboring against appellant in that an illegal alien had furnished information to the I.N.S. in or about July 1974 that other illegal aliens were residing at appellant's homes. More recently, however, one, Ernesto Lopez had given information to the I.N.S. of the physical location of appellant's dwellings but did not furnish the name of appellant. However, Agent Jacobs ascertained several weeks before February 12, 1975 the true name and identity of the owner of premises 113 Brittle Lane and 18 Bunting Lane as being appellant.

The government concedes that no search warrant for the premises was ever obtained, no warrant of arrest for any of the illegal aliens, no administrative warrant was issued by the I.N.S. In fact, it is conceded by the government that no reasonable or probable cause existed on February 12, 1975 to believe that any of the aliens mentioned in the indictment were residing at said premises or that appellant was guilty of harboring any of the said illegal aliens mentioned in the indictment.

The government's theory in defense of the warrantless entry and search of the dwellings by the I.N.S. agents was that under the statute Title 8, Sec. 1324(a)(3) the I.N.S. agent was permitted to stop and confront any person believed to be an illegal alien and interrogate such person with reference to his right to remain in the United States. The government further argued that once having established the illegal status of Jorge Galeac, that the I.N.S. agents were permitted to enter the premises and search the premises due to the "exigencies of the situation". The "exigencies of the sitution" was explained as being based on the fear that the illegal aliens then in the dwellings would flee while application was being made by the I.N.S. agent for a search warrant.

Appellant contends and argued in the District Court that the "exigencies of the situation" did not prevent one of the four agents from making application for a search warrant to a District Court Judge. Any fear that any of the occupants of the dwelling would flee in the interim could easily have been prevented by stationing one of the three remaining I.N.S. agents at the front door and one of the I.N.S. agents at the rear door and the third I.N.S. agent to cover any other attempted exit from the building.

The District Court did not make specific finds of fact but did adopt the government's theory and held that the stopping of the alien (Galeac) was in accordance with statutory authority and the warrantless entry into the premises was authorized and the later "exigencies of the situation" were sufficient not to require a search warrant.

After the hearing and determination by the District Court, the trial was commenced before HON. THOMAS C. PLATT and a jury on the 26th day of March 1975 and was concluded on the 1st day of April 1975. The government's theory of the prosecution as revealed in both the opening statement of Asst. U.S. Attorney Corcoran and the summation was to the effect that the mere offering of food and shelter by appellant to the illegal aliens with knowledge of their illegal status was sufficient under the law to constitute a violation of the "harboring" proscribed by the statute. (Title 8, USC Sec. 1324(a)(3).

Appellant's theory of defense as revealed by both the opening of counsel and the summation was to the effect that the proof required to establish the "harboring" proscribed by statute required proof of a clandestine furnishing of food and shelter and further, that the acts and conduct of the appellant were done "knowingly" and "wilfully" with specific intent to commit the crime of harboring. Appellant's request to charge in accordance with the theory advanced by appellant's counsel as to "harboring", "knowingly", "Wilfully" and "ignorance of the law" were denied by the District Court and exception taken by appellant's counsel so that the matter has been properly preserved for appellate review by this court.

The trial evidence established that appellant did in fact give housing and shelter at premises 18 Bunting Lane and 113 Brittle Lane on February 12, 1975 to a number of aliens, some legally in this country and some illegally in the country. The evidence clearly established that when appellant did give such

housing and shelter, that it was done openly and there was no act or conduct of a clandestine or secretive nature done by the appellant in furnishing such housing and shelter. The record further clearly indicates that appellant did not, in any way, participate in any aspect of the so-called smuggling operation. No evidence was introduced to establish any nexus or connection between the illegal entry of the alien into the U.S. by any person or persons aiding in such an illegal entry and the appellant. In fact, it was conceded by the government that had such evidence been available to the government, appellant would have been charged in a separate count with transportation of such illegal aliens or aiding in connection therewith.

At the conclusion of the trial, the government withdrew Count 8 of the indictment since no testimony was furnished by the alien mentioned therein. The jury found the appellant not guilty on Counts 4,5,7,9,10,11 and 12. Appellant was found guilty on Counts 1,2,3 and 6. Counts 10, 11 and 12 of the indictment related solely to premises 113 Brittle Lane. The jury having found the appellant not guilty as to these counts, the motion to suppress in branch as to this dwelling is academic. Consideration, however, was given to the acts and conduct of the I.N.S. agents in their search of said premises as revealing the state of mind or plan and scheme of the I.N.S. agents in the so-called field investigation which was made. Appellant contends that the acts and conduct of the I.N.S. agents as to this dwelling clearly indicate a preconceived plan or scheme to make a warrantless entry into the premises for the purpose of conducting

a room by room search of said premises in total violation of the Fourth Amendment rights of the appellant. The so-called alien's consent of a warrantless arrest serves no predicate for the warrantless entry into appellant's dwelling.

On July 18, 1975 appellant was sentenced as follows:

Count 1- 4 years imprisonment and $1,000. fine;

Count 2- 4 years imprisonment (to run concurrently with Count 1) and $1,000. fine;

Count 3- 4 years imprisonment (to run concurrently with Count 1)

Count 6- 4 years imprisonment (to run concurrently with Count 1) and $1,000. fine.

A total fine of $4,000. was imposed together with four years imprisonment.

## STATEMENT OF ISSUE

1. Did the District Court err in not dismissing the indictment based on insufficiency of evidence presented to the grand jury and the tainted evidence (product of illegal search and seizure) consisting of the testimony of two illegal aliens and I.N.S.Agent Neil Jacobs; was the evidence before the grand jury insufficient to establish conduct of appellant proscribed by statute; was the statute Title 8 U.S.C.1324(a)(3) unconstitutional in being vague, overbroad and in violation of constitutionally protected equal rights of appellant.

2. Did the District Court err in denying appellant's motion for a trial order of dismissal for failure of the government to prove that appellant had harbored any aliens within the proper

definition of the terms "harboring" "wilfully" and "knowingly".

3. Did the District Court err in not granting appellant's motion to suppress based on the evidence of the suppression hearing which established a warrantless entry and search of the dwellings.

4. Did the District Court err in the sentence imposed on appellant.

## POINT I

THE DISTRICT COURT ERRED IN NOT DISMISSING THE INDICTMENT FOR INSUFFICIENCY OF EVIDENCE BEFORE THE GRAND JURY TO SUPPORT EACH AND EVERY COUNT OF THE INDICTMENT, THE CONDUCT OF APPELLANT WAS NOT WITHIN THE PROSCRIPTION OF THE STATUTE

One of the substantive elements required to be established by competent proof to show prima facie violation by appellant was that appellant had knowledge on February 12, 1975 or prior thereto of the illegal alien status of each of the aliens which appellant was accused of harboring. No reason appears as to why each alien mentioned in the indictment was not presented before the grand jury. The government's contention was that knowledge by appellant of the illegal alien status of each alien mentioned in each count of the indictment was established because of the presence of the aliens in appellant's premises on February 12, 1975 and that by reason of the number of illegal aliens therein, that such knowledge was imputable to appellant as a matter of law. The jury, in its wisdom, determined from the facts in this case that such knowledge of

the illegal alien status was not imputable to appellant and therefore dismissed Counts 4,5,7,9,10,11 & 12. Therefore, neither as a matter of fact nor as a matter of law would the number of illegal aliens on the premises constitute knowledge by appellant.

Counts 3 to 12 of the indictment were not supported by the testimony of each of the aliens claimed to have been harbored by appellant. In the absence of testimony from these aliens that appellant had knowledge of their status, the remaining evidence before the grand jury was insufficient to permit an inference of knowledge to be drawn as a matter of law. Under the circumstances, therefore, Counts 3 to 12 of the indictment should have been dismissed for insufficiency of evidence. In view of the jury determination of not guilty on counts enumerated as 10, 11 and 12 and which applied solely to premises 113 Brittle Lane, the appeal as to such counts is moot.

## POINT II

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS THE INDICTMENT BASED ON TAINTED EVIDENCE SUBMITTED TO THE GRAND JURY OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT RIGHTS OF APPELLANT AND ERRED IN FAILING TO GRANT APPELLANT'S MOTION TO SUPPRESS THE EVIDENCE SINCE THE EVIDENCE ADDUCED AT THE SUPPRESSION HEARING ESTABLISHED A WARRANTLESS ENTRY INTO APPELLANT'S DWELLING.

Appellant contends that from the inception of the I.N.S. investigation by Neil Jacobs several weeks prior to the "hit" at appellant's dwelling on February 12, 1975, that appellant was the target of such investigation. The crime with which appellant

was subsequently charged was within the ambit of such investigation. The proof established that Neil Jacobs, the I.N.S. Criminal Investigator was also the investigator in the Lopez case (75-1023 C.A.So.Dist.) and was familiar with the harboring statute.

While appellant's correct name was not known to Jacobs, he nevertheless did establish the identity of appellant after personal contact at the Nassau County Clerk's Office several weeks before February 12, 1975.

In preparation for the so-called "hit" of appellant's premises, the modus operandi was discussed by Neil Jacobs with his superior on the day before. Eight agents were assigned to the task. Four automobiles in all were used. There was radio communication between the vehicles. It was determined to rendezvous in Nassau County at a diner near the premises at 7 A.M. The hour of the day was selected with some degree of care. All agents spoke Spanish.

The significance was that the people residing at the premises would be leaving for work at about that time. The plan then was to apprehend any person exiting from either of the premises, stop such person and interrogate such person with respect to their status to remain in the country. The person was then directed to enter the premises in the company of one or more agents. (There were four agents assigned to each house.) Once inside the premises, a systematic search of each room was made to determine the presence of any persons therein and inquire as to their status to remain in this country. After the

aliens were apprehended, they were brought to the Detention Quarters at 20 West Broadway, Manhattan, New York. Statements were taken from each of said aliens which included information not only as to the illegal status of such aliens but also information seeking to establish appellant's violation of the law against harboring. With amazing speed and without any further investigation, after the apprehension of the aliens, the matter was presented to the grand jury on the following day, namely, February 13, 1975 at which time the indictment in this case was handed up.

Appellant argues and contends that on the basis of these facts, it is a mockery to say that appellant was not the target of the investigation or was not within the ambit of the investigation to the extent of charging him with harboring which is a serious crime. The less serious offense which was investigated by the I.N.S. agents concerned itself with the illegal alien status of the persons residing in the premises. The illegal aliens faced civil deportation proceedings and can in no way be compared with the seriousness of the charges lodged against appellant.

The law in support of the proposition that testimony of witnesses discovered during the illegal search can be excluded is U.S. v. Tane 329 F2d 848 (2nd Cir.1964). The holding was later followed in Smith v. U.S.120 U.S.App.DC 160,344 F2d 545 (1965).

The later cases involving violations of the immigration laws as to transportation of aliens (8 U.S.C. Sec.1324(a)(2) applied the exclusionary rule to the testimony of the transported

aliens who were discovered following a warrantless stop of defendant's car in U.S. v. Brignoni Ponce 499 F2d 1109, C.A.9th Cir. June 17, 1974. The same exclusionary rule was also applied in an alien's transportation case by car in U.S. v. Guana Sanchez 484 Fed. Reporter 2nd Series 590 (C.A.7th Cir. August 1973). The exclusionary rule was approved by the U.S. Supreme Court in Almeida Sanchez v. U.S. 413 U.S. 266,93 S.Ct. 2535, 37 L.Ed.2d 596 (1973).

The government argued that the proceedings were civil in nature (that is with respect to the deportation proceedings) and therefore the exclusionary rule was inapplicable. The New York State Law, however, is to the contrary. People v. LaVerne 14 NY2d 304,251 NYS2d 452. In Almeida Sanchez v. U.S. (supra) the court likewise considered the impact of the civil nature of the proceedings as follows at page 272: "Neither this court's automobile search decision nor its administrative inspection decisions provide any support for the constitutionality of the stop and search in the present case". Appellant urges that the exclusionary rule as enunciated in the automobile cases should be applied with even greater vigor where the premises consists of a dwelling in the sole ownership of the appellant and exclusive use of which premises has not been given to another. (Rosenkranz v. U.S., C.A.1st 1966, 356,F2d 310,312-313)

Appellant contends in conclusion that the government failed to meet the legal burden of justifying the warrantless entry and search of appellant's premises, in violation of his constitutionally protected Fourth Amendment rights. Submission

by the aliens to their warrantless arrest constitutes no authority for the warrantless entry and search.

The method and manner in which entry was made into the dwellings is of particular significance. The so-called consent of the aliens is relied upon by the government. A warrantless entry was made into premises 113 Brittle Lane. Alien's consent is claimed by the government to justify the warrantless entry. The warrantless entry into premises 18 Bunting Lane is justified by the government in that probable cause and exigent circumstances are claimed upon finding another illegal alien inside the premises. Consideration will be given as to the general rules relating to consent and exigent circumstances. Consent constitutes a waiver of constitutional protections. "Courts indulge every reasonable presumption against waiver of fundamental rights". (Johnson v. Zerbst 304 U.S. 458) When consent is claimed, the burden of proof is upon the government to affirmatively establish free and voluntary consent. Hubbard v. Tensley, 336 F.2d 854; Weed v. U.S., 340 F2d 827; U.S.v.Como, 340 F.2d 891; Landsown v. U.S., 348 F2d 405; Pekar v. U.S., 315 F.2d 319; Hall v. Warden, 315 F.2d 483; Badillo v. Superior Court, 46 Cal. 2d 269; U.S.v. Viale, 312 F. 595; Villano v. U.S. 310 F.2d 680; U.S. v. Smith 308 F.2d 657, 663; State v. Kananen (Ariz.) 399 P.2d 426; Peo. v. Stokes, 15 N.Y.2d 543.

The general rule is that consent must be given freely and intelligently. It must be unequivocally and specifically a consent to search, not merely to enter. (Robertson v. State Tex. 375 S.W.2d 457) It must be uncontaminated by any form of duress

or coercion actual or implied (Amos v. United States, 255 U.S. 313; Channel v. U.S., 285 F.2d 217; Judd v. U.S., 190 F.2d 649; Higgins v. U.S., 209 F.2d 819)

The fact that a person is in "custody" on the street, in his home, or in a police station, is a circumstance of particular significance. To this must be added custody in an automobile.

Thus, when the police are engaged in a "trespass" in the home, the consent is deemed impliedly coerced no matter how cooperative the suspect. This is deemed merely submission to authority (Waldron v. U.S. 219 F.2d 37). It is the right of one faced with authority to submit. Consent can never be found from a failure to argue with the police. Coercion and duress are almost necessarily implicit in such situations.

With reference to the government's contention of exigent circumstances, the court respectfully referred to U.S. v. Rosselli-C.A.Ill. 1974, 506 Fd 627. In that case it was held that the warrantless entry by government agents into the apartment of defendant was not justified by the risk that a third party might telephone a warning to defendant thereby making prompt action imperative where, if the risk of such a call created an apparent emergency, such could have been avoided by leaving an agent with the third party while a warrant was being secured.

In the instant case, as noted hereinbefore, a great deal of preparation and planning went into the strategem employed by the agents. The I.N.S. agents had made definite plans for any emergency. Eight agents were selected for the operation. All

spoke Spanish. The I.N.S. agents were neither surprised nor considered the situation an emergency when the aliens were encountered. As in U.S. v. Rosselli (supra), since there were four agents at each of the premises, one agent could easily have obtained the search warrant or warrant of arrest while three other agents were guarding the premises. The District Court was easily accessible in Brooklyn and within approximately 45 minutes by vehicle application could be made to the District Court. Obviously the I.N.S. agents had not considered the Fourth Amendment constitutionally protected rights of appellant and were content to carry out their pre-arranged plan or scheme to make entry without a warrant of arrest or search warrant.

## POINT III

THE DISTRICT COURT ERRED IN REFUSING APPELLANT 'S REQUEST TO CHARGE CONCERNING "HARBORING" (REQUEST #1) AND "KNOWINGLY "WILFULLY" (REQUEST #4); IGNORANCE OF THE LAW (REQUEST #5)

Appellant's request #1 as furnished in writing to the District Court is as follows:

"HARBORING OR CONCEALING"

Harboring or concealing....the statute making it an offense to wilfully or knowingly conceal or harbor an alien of the classes described is directed against those who abet violators of the law against unlawful entry.[80] The word harbor denotes surreptitious concealment,[81] and, in connection with the purpose of the act, means to clandestinely shelter, succor and

protect improperly admitted aliens.[82] The word conceal means to shield aliens from observation and permit their discovery.[83] Knowledge of the fact that the person harbored or concealed an alien is an essential element of the crime.[84]

The above material was quoted from Corpus Juris Secundum, Aliens, p. 145.

80. U.S.--U.S. v. Mack C.C.A.N.Y., 112 F.2d 290
81. U.S.--U.S. v. Mack,C.C.A.N.Y., 112 F.2d 290
82. U.S.--Susnjar v. U.S., C.C.A. Ohio, 27 F.2d 223
83. U.S.--Susnjar v. U.S., C.C.A. Ohio, 27 F.2d 223
84. U.S.--U.S. v. Mack, C.C.A.N.Y., 112 F.2d 290.

The District Court charged the jury on the basis of the Herrera decision (Herrera v. U.S., C.A. Cal.1953,208 F2d 215, certiorari denied, 74 S.Ct.529,347 U.S.927,98 L.Ed.1080) The court charged the jury instead as follows:

> "The definition of harboring is defined by Webster's New International Dictionary, Second Edition, Unabridged, as "To afford lodging to, to entertain as a guest, to shelter, to receive or give a refuge to, now usually with reference to evil, especially unlawful act or intent."

On the request to charge "wilfully", the court refused to charge "with the specific intent to do something the law forbids." With regard to the request to charge "knowingly", the court deliberately omitted that "specific intent must be proven before there can be a conviction."

Taking the entire court's charge as a whole, it would appear the government's theory of the case was adopted in toto in that a conviction could be had by the jury in the event that the evidence established 1) that the defendant harbored the designated person at the state addressed; 2) that the defendant did

so wilfully and knowingly; 3) that such person was an alien not lawfully entitled to reside within the United States, and 4) that the defendant then knew that such person was an illegal alien."

The District Court in effect held that the word "harboring" was to be construed in accordance with the ordinary meaning as understood by the so-called ordinary man. Thus, the court, in order to aid the jury in its construction of the ordinary meaning made reference to the dictionary meaning. The dictionary meaning, however, furnished no clarification as to the meaning of the word "harboring". Indeed, the definition furnished was confusing. On the one hand the mere furnishing of lodging or shelter was sufficient conduct on the part of any person, or the appellant in this case, to constitute the harboring proscribed by statute. The act of affording lodging or shelter is in and of itself an innocent act not normally attenuated in any way with criminal conduct. On the other hand, the so-called harboring "with reference to evil, especially unlawful act or intent", as charged, was not delineated with particularity by the court and the charge was "fudged" to such extent that it would appear the court had adopted the government's theory of the case and find the appellant guilty for mere furnishing of lodging or shelter to the illegal aliens. As noted, the definition of "harboring" was the so-called dictionary definition although the latest Webster Edition was not furnished, although appellant requested the more recent dictionary definition. The gravamen, however, of the court's charge lay in the judicial assumption that the

word "harboring" was to be given its ordinary meaning. Appellant contended that the word was to be given a technical meaning and that such technical meaning was to be ascertained from the decisional law, as set forth in Request #1.

In the Lopez case (supra) this Court of Appeals (75-1023) recognized the legislative oversight as pointed out in the Evans case (333 U.S. 495) by adopting Public Law 283, Chapter 108. Even then Congress, after careful and deliberate consideration of the problem of illegal aliens, failed to define the term "harboring" as used in the newly enacted section. Such meaning as could be attributed to the word "harboring" was to be found in the legislative debates by this Appellate Court in the Lopez case.

In the Lopez case this Court of Appeals recognizing the burden placed upon the court by Congressional failure to define "harboring" was then obliged to fashion a definition based upon the statutory rules of construction and stated as follows:

> "Although our task would have been lightened if Congress had expressly defined the word "harbor", we are persuaded by the language and background of the revision of the statute that the term was intended to encompass conduct tending substantially to facilitate an alien's "remaining in the United States illegally", provided, of course, the person charged has knowledge of the alien's unlawful status."

Thus, this Court was obliged to do that which Congress failed to do, namely, define the word "harbor". Appellant contends that the word "harbor" is a technical term and therefore is to be defined in accordance with the established decisional law, as contained in Request #1 to charge. The charge of the

District Court obviously did not coincide with the definition of "harboring", as defined by the court in the Lopez case. While appellant's contention in the court below encompassed a definition broader in scope than the so-called "Lopez" definition, appellant contends that on the basis of the Lopez decision, that reversible error was committed by the court below in the charge as given. The mere furnishing of shelter and lodging does not constitute "conduct tending substantially to facilitate the aliens remaining in the United States illegally." The emphasis in the definition is more upon the person's knowledge of the alien's unlawful status rather than the furnishing of lodging and shelter. The furnishing of employment does not constitute harboring as an exception under the statute.

The acts and conduct of appellant are diametrically opposed to the acts and conduct of Lopez wherein, even without the harboring statute Lopez's acts would fall into an illegal or criminal category by arrangement of sham marri[illegible], obtaining employment and transporting them to and from their jobs.

## POINT IV

### THE STATUTE TITLE 8 U.S.C.SEC.1324(a)(3) IS UNCONSTITUTIONAL IN THAT IT IS VAGUE AND UNCERTAIN, OVERBROAD AND VIOLATES THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION.

Appellant relies upon the argument made in the Lopez case (75-1203) with reference to the unconstitutionality of the statute. This Court of Appeals having held, however, that the statute is constitutional would not warrant a re-argument of the

question of constitutionality. However, appellant urges on this appeal the unconstitutionality of the statute since if the point was not raised it may be deemed to have been abandoned. The Lopez case is sought to be appealed further to the United States Supreme Court and for this reason appellant seeks to preserve whatever appellant's rights he may have in the premises based upon the claimed unconstitutionality.

## POINT V

THE SENTENCE OF THE COURT WAS EXCESSIVE IN THE LIGHT OF APPELLANT'S AGE, NO PRIOR RECORD, HISTORY OF EMPLOYMENT AND STANDING IN THE COMMUNITY.

Upon the sentence of the appellant, the probation report stressed very heavily that the appellant had failed to acknowledge his guilt. Appellant's guilt was a mixed question of fact and law. The word "harbor", if defined as contended by appellant, under the facts as established in the case would require not only dismissal of the indictment but an order of dismissal at the end of the government's case. This is so because the record is barren completely of any clandestine or concealed actions or conduct on the part of the appellant in connection with the lodging and shelter furnished.

Appellant is 37 years of age, has been gainfully employed as a baker since his lawful entry into the United States twelve years ago. Appellant has had not even a brush with the law. Appellant was not guilty of any venal act, as in the Lopez case. The national concern with the illegal alien problem has focused news media attention on this case. Under ordinary

circumstances appellant would have been entitled to probation having lived an exemplary life for thirty-seven years. Congress will undoubtedly propose remedial legislation in connection with the illegal alien problem. Appellant has not been dealt with fairly in the sentence imposed and the sentence of the court of four years imprisonment should be set aside.

## CONCLUSION

The indictment should be dismissed because insufficient evidence was presented before the grand jury as well as tainted evidence which should have been suppressed on the basis of the hearing held and the sentence of the District Court should be modified by a sentence of probation rather than imprisonment, if the indictment is not dismissed.

Respectfully submitted,

ANTHONY F. CORRERI
Attorney for Appellant

Dated: Mineola, New York
September 23, 1975

## STATUTE INVOLVED

Title 8 United States Code, Section 1324 of the Immigration and Nationality Act of 1952.

(a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who-

(1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;

(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or means of transportation; or

(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of--any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not

exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: Provided, however, That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

(b) No officer or personal shall have authority to make any arrest for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, whose duty it is to enforce criminal laws. June 27, 1952, c.477, Title II, ch.8, Sec. 274, 66 Stat.228

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SECTION 1357 - POWERS OF IMMIGRATION OFFICERS AND EMPLOYEES-POWERS WITHOUT WARRANT

(a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant--

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant

can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;

(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States.

## CASES CITED

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STATE OF NEW YORK )
ss.:
COUNTY OF NASSAU )

DOROTHY A. DELANEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at Farmingdale, New York.

That on the 24th day of September, 1975 deponent served the within Appellant's Brief (2 copies) upon the United States Attorney's Office for the Eastern District of New York at 225 Cadman Plaza East, Brooklyn, New York, attorneys for the United States Government in this action, the address designated by said attorney for that purpose, by depositing a true copy of same enclosed in a postpaid properly addressed wrapper in a post office depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Dorothy a Delaney

Sworn to before me this 24th
day of September, 1975

Anthony F. Correri

ANTHONY F. CORRERI

NOTARY PUBLIC, State of New
No. 30-0823900 Qual. in Nassau
Term Expires March 30, 1976